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No. 81-2325

IN THE

Supreme Court of the United States

October Term, 1982

ATLANTA GAS LIGHT COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF ATLANTA GAS LIGHT COMPANY TO OPPOSITION OF THE UNITED STATES DEPARTMENT OF ENERGY

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The weakness of the Government's opposition and its inexplicable misstatements of the record reflect its inability to support the Eleventh Circuit's dismissal of Atlanta Gas' review petition against this Court's holding in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and Section 702 of the Fuel Use Act, 42 U.S.C. § 8412.

ARGUMENT

The Government argues that Petitioner "seriously misstates . . . the holding of *Abbott Laboratories*". (Gov't at 8). On the contrary; it is the Government which mistates this Court's holding in an effort to obfuscate the fact that Atlanta Gas' case is on all fours with *Abbott Laboratories*.

In *Abbott Laboratories*, the Court was faced with a decision by the Third Circuit that a pre-enforcement challenge to effective regulations under the Food, Drug, and Cosmetic Act was not ripe for review because there was no actual case or controversy.

Here, the Court is faced with a decision by the Eleventh Circuit that because no enforcement action has been brought against Atlanta Gas, its pre-enforcement challenge to effective regulations under the Fuel Use Act is not ripe for review.

In *Abbott Laboratories* the Court first analyzed whether Congress intended to forbid pre-enforcement review of the challenged regulation, noting:

> The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

387 U.S. at 140. Because the statute did not specifically provide for review of the regulation in question, the Court reviewed its legislative history to determine whether Congress intended to bar pre-enforcement review. Finding no such intent and emphasizing the reluctance of the Court to cut off "the well-established jurisdiction of the federal courts to hear, in appropriate cases, suits . . . challenging final agency action" (387 U.S. at 148) the Court concluded

that the Food, Drug and Cosmetic Act did not preclude pre-enforcement review.

Here, Section 702 of the Fuel Use Act specifically provides for pre-enforcement review of agency regulations.

The *Abbott Laboratories* Court then examined whether the case was "ripe" for judicial review. Guided by the basic rationale of the ripeness doctrine—to prevent the courts from entangling themselves in abstract disagreements over administrative policies, and to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way—the Court found that because the issue was purely legal and because the regulations were "final agency action" which had an immediate effect on the conduct of the petitioners' affairs, the case was ripe for review.

In so ruling, the Court rejected the Government's argument that because only the Attorney General, not the agency, could authorize the institution of criminal or civil actions the case was not ripe for review:

> These regulations are not meant to advise the Attorney General, but purport to be directly authorized by the statute. Thus, if within the Commission's authority, they have the status of law and violations of them carry heavy criminal and civil sanctions.

387 U.S. at 152. The Court also disregarded the Solicitor General's representation that if enforcement should become necessary, the Department of Justice would proceed only civilly for an injunction or by condemnation:

> [W]e cannot accept this argument as a sufficient answer to petitioners' petition. This action at its inception was properly brought and this

> subsequent representation of the Department of Justice should not suffice to defeat it.

387 U.S. at 154.

Here, the Government argues that Atlanta Gas' challenge is not ripe for review because, until an enforcement action is brought, Atlanta Gas cannot be "aggrieved" by the Secretary's regulations. And, the Government continues, because enforcement power has been delegated to the States, Atlanta Gas' challenge can only be ripe for review if it relates to action taken by the State of Georgia. The Government's arguments parrot the arguments made and rejected over fifteen years ago in *Abbott Laboratories*. Similarly, the arguments should be rejected now.

What the Court said in *Abbott Laboratories* is surely applicable here, where the federal agency itself transferred its enforcement authority to the States:

> These regulations are not meant to advise . . . [the States], but purport to be directly authorized by the statute. Thus, if within the . . . [Secretary's] authority, they have the status of law and violations of them carry heavy . . . civil sanctions.

387 U.S. at 152. Who is responsible for enforcement of the Secretary's regulation is immaterial. What is material is that the regulations are in effect, carry the force of law, and directly affect the conduct of Atlanta Gas' gas distribution operation.

The Government argues that the case is not ripe for review because, were the Secretary to rescind his delegation and exercise his enforcement authority, "petitioner does not suggest, nor is it plausible to assume, that any reversion of authority to the federal government would result in federal prosecution for violations that occurred during the time the delegation was in effect". (Gov't at 9). As this Court noted in *Abbott Laboratories*, this does not answer petitioner's petition. Atlanta Gas' proceeding was properly brought at

its inception and this representation by the Solicitor General should not defeat it.

In a final effort to convince this Court that Atlanta Gas' underlying due process challenge is without merit, the Government seriously misstates the record below.

The Government states that petitioner does not deny that there are gas lights on the company's side of the gas meter over which the Petitioner has full control (Gov't at 11-12). This statement simply is not true. In the record below, the following statement from the testimony of the President of Atlanta Gas in hearings before the Department of Energy makes it clear that *all* of the gas lights served by Atlanta Gas are located downstream of the meter, that is, on the customer's side of the meter:

> All of our gas lights were connected downstream of the meter, and thus they represent the property of the homeowner.

(J.A. 198). The continuation of this quotation from the record demonstrates that without terminating *all* gas service to the customer, Atlanta Gas cannot ensure compliance with the federal regulations requiring it to discontinue service to outdoor gas lights:

> Let's assume, for purpose of the discussion, that through efforts of our employees we do locate all of the gas lights on customers' premises. What then?
>
> The company can, of course, notify the customer that he must disconnect his gas lights but, knowing the people in Georgia, I doubt that any of them would do it because we asked them to.
>
> There is nothing in the company's rules and regulations that permits the company to enter upon the premises of its customer, except to read the meter and to maintain our company's facilities on a customer's premises.

* * *

> The problem is under this law the use is not illegal. The customer still can burn it and its legal for him to do so.
>
> What is unlawful is for us to provide the service, which is quite a dilemma.

(J.A. 198-199).

And, the Government's cavalier suggestion to this Court, that State trespass laws, utility laws, and the common law duty of a public utility to provide continuous and reliable service are preempted so as to authorize Atlanta Gas to terminate all gas service to a customer who continues to use his outdoor gas light or enter on the customer's property to disconnect the gas light, is preposterous. No such broad preemption authority has been shown, nor does it exist. In fact, the disingenuity of this argument is shown by the following colloquy from the record below, where the Government explicitly refused to include in its regulations language to clarify the preemptive nature of the statute and its regulations:

> Mr. LaBoon [President of Atlanta Gas]: The big hangup, as I see it, is the Act itself doesn't pass on any legal authority to a State nor to the utility . . . [to] force a man to turn his gas off.
>
> In fact, the Act doesn't even make it illegal for the homeowner to burn the gas light.
>
> Ms. Rowan [Hearing Officer]: That's some of our own problem.
>
> Mr. LaBoon: I understand that.
>
> Ms. Rowan: We question whether or where in Section 402 of FUA, or any place else in FUA applicable to 402, that we would have the authority to issue regulations that would give you the type of protection that you're talking about.

(J.A.200).

* * *

> Mr. Elliott [Vice President, Laclede Gas Company]: ... [Y]ou are supposed to give us guidelines, according to the conference report.
>
> Ms. Rowan: Our problem is that we don't see how mere guidelines is [sic] going to remove threats such as potential threats say of criminal trespass prosecutions if you go on private land... I don't see in the statute at this point where we are given the authority.

(J.A. 205).

CONCLUSION

The case before the Court is *Abbott Laboratories*, revisited. The essential, uncontroverted facts, as set forth in the petition are:

1. The Fuel Use Act specifically provides that judicial review may be sought by any person aggrieved by final agency rules imposing a prohibition;
2. The challenged regulation is a final agency rule imposing a prohibition;
3. The challenged regulation is in effect;
4. The challenged regulation directly impacts on petitioner;
5. Heavy civil fines and penalties attach for non-compliance; and
6. Compliance with the regulation requires significant changes in the operations of Atlanta Gas.

The Government's opposition simply reveals its reluctance to accept this Court's holding in *Abbott Laboratories*, a holding from which the Eleventh Circuit significantly departed.

To avoid the erosion of the principles established by this Court in *Abbott Laboratories*, the petition should be granted and the case remanded to the United States Court

of Appeal for the Eleventh Circuit. Petitioner suggests that further briefing or argument to this Court is unnecessary and that, in view of the weakness of the Government's opposition, summary reversal is clearly in order.

Respectfully submitted,

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